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Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States
October Term, 1994

VINCENT E. ANDREWS, *Petitioner*

V.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the
United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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September 1994

24 pp

QUESTION PRESENTED

DOES THE UNITED STATES CONSTITUTION PROHIBIT THE CRIMINALIZATION OF PRIVATE, NONCOMMERCIAL, CONSENSUAL, ADULT, HETEROSEXUAL ORAL SEX?

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1994

No. 94-____

VINCENT E. ANDREWS,
Petitioner
V.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Vincent E. Andrews, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 28, 1994.

OPINIONS BELOW

The order of the United States Court of Military Appeals summarily affirming the Navy-Marine Corps Court of Military Review has not yet been published and is attached as Appendix A. The opinion of the Navy-Marine Corps Court of Military Review was not published and is attached as Appendix D.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on June 28, 1994. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a).

STATUTORY PROVISION INVOLVED

10 U.S.C. § 925, Art. 125, Uniform Code of Military Justice provides:

Section 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

STATEMENT OF THE CASE

On March 18, 1992, the petitioner, Vincent E. Andrews, a Navy petty officer, was tried by a general court-martial composed of military judge alone. Pursuant to his pleas, petitioner was convicted, *inter alia*, of one specification of sodomy in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.], Article 125. He was sentenced to confinement for thirty months, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and a bad-conduct discharge.

During the guilty plea inquiry at trial regarding the sodomy charge, petitioner told the trial judge that his girlfriend, Petty Officer Catherine Holt, had willingly taken petitioner's penis into her mouth. Petitioner explained that they had been arguing throughout the day, had reconciled, and that he wanted to make love. Reluctant to engage in sexual intercourse because she was scheduled to see a gynecologist the following morning, Holt agreed to satisfy him "another way." Record at 37.[1]

The Navy-Marine Corps Court of Military Review summarily affirmed the petitioner's sodomy conviction without discussion, citing *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992) and *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992), *cert. denied*, 113 S. Ct. 92 (1992). App. D. The United States Court of Military Appeals granted review of petitioner's case but not on this enumerated issue. App. C. The Court of Military Appeals denied petitioner's petition for reconsideration of the denial of this enumerated issue. App. B. On review, the Court of Military Appeals summarily affirmed, citing *United States v. Mitchell*, 39 M.J. 131 (C.M.A. 1994), and *United States v. Lewis*, 39 M.J. 280 (sep. op.)(C.M.A. 1994). App. A.

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[1]Petty Officer Holt testified during the sentencing portion of the court-martial that her performing fellatio on Petitioner was not fully voluntary. The trial judge limited his consideration of her testimony solely to describing the circumstances of the sodomy and to demonstrate victim impact. Record at 129.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT AMONG THE VARIOUS STATE AND FEDERAL JURISDICTIONS OVER WHETHER THE UNITED STATES CONSTITUTION PROHIBITS THE CRIMINALIZATION OF CONSENSUAL, NONCOMMERCIAL, PRIVATE, HETEROSEXUAL ORAL SEX.

The United States Court of Military Appeals has ruled that Congress' decision to criminalize heterosexual fellatio under the Uniform Code of Military Justice does not violate a constitutional right to privacy. *United States v. Henderson*, 34 M.J. 174, 176-78 (C.M.A. 1992). Yet, in the same opinion, the Court of Military Appeals noted that "many jurisdictions, today, have decriminalized private, noncommercial, heterosexual, consensual fellatio among adults" for a host of reasons, including "judicial interpretation that the conduct is constitutionally protected . . . ." *Henderson*, 34 M.J. at 178. Nor is the Court of Military Appeals the only court to recognize this split. "[A]mong the courts addressing the constitutionality of punishing consensual, heterosexual acts between consenting adults in private, there is a significant division throughout the country." *Schochet v. State*, 580 A.2d 176, 181 (Md. 1990). No consensus has emerged from these decisions; rather, there has been an "approximately even division among appellate courts." *Id.* at 183.[2]

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[2]The Rhode Island Supreme Court, North Carolina Court of Appeals, Indiana Supreme Court, Arizona Supreme Court, New Mexico Supreme Court and, in an opinion which was later reversed, Maryland Court of Special Appeals have ruled that the United States Constitution accords no protection to acts of consensual heterosexual sodomy performed by unmarried adults. *State v. Santos*, 413 A.2d 58 (R.I. 1980)(rejecting challenge to proscription of anal intercourse); *State v. Poe*, 252

There has been a historical split within the lower military courts, as well. The Air Force Court of Military Review held that the Federal Constitution protects this activity from criminal prosecution. *See United States v. Fagg*, 33 M.J. 618 (A.F.C.M.R. 1991), *rev'd*, 34 M.J. 179 (C.M.A. 1992), *cert. denied*, 113 S.Ct. 92 (1992). However, the Court of Military Appeals reversed the Air Force court's decision, referencing its own decision in *Henderson*, 34 M.J. 174 (C.M.A. 1992), decided the same day as Fagg's case.[3] The Court of Military Appeals stated that although it "sympathiz[ed] with the [petitioner] regarding this particular conviction for what

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S.E.2d 843 (N.C. App.), *cert. denied*, 259 S.E.2d 304 (N.C. 1979), *appeal dismissed*, 429 U.S. 947 (1980); *Dixon v. State*, 268 N.E.2d 84, 86 (Ind. 1971); *State v. Bateman*, 547 P.2d 6, 9, 10 (Ariz.), *cert. denied*, 429 U.S. 864 (1976); *State v. Elliot*, 551 P.2d 1352 (N.M. 1976); *Schochet v. State*, 541 A.2d 183 (Md. App. 1988), *rev'd*, 580 A.2d 176 (Md. 1990).

In stark contrast to these decisions, many jurisdictions have held that the Constitution precludes the criminalization of consensual, private, noncommercial heterosexual oral sex. The Iowa Supreme Court, Massachusetts Supreme Judicial Court, New York Court of Appeals, Oklahoma Court of Criminal Appeals, and the Pennsylvania Supreme Court have recognized such a constitutional right. *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *Commonwealth v. Balthazar*, 318 N.E.2d 478, 481 (Mass. 1974); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981); *Post v. State*, 715 P.2d 1105 (Okla. Crim. App.), *cert. denied* 479 U.S. 890 (1986); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980). *See also State v. Saunders*, 381 A.2d 333 (N.J. 1977)(holding that the Federal Constitution precludes criminalization of fornication).

[3]In *Henderson*, the Court of Military Appeals affirmed an accused's conviction for private, noncommercial, consensual, heterosexual fellatio. In so doing, the Court rejected the appellant's contention that his conduct was not proscribed by Article 125(a), holding that oral copulation has been "openly and expressly prohibited in the armed forces of the United States since time immemorial." 34 M.J. at 176. Although the Court recognized that Massachusetts, where Henderson's act took place, like many other states, had decriminalized private, noncommercial, heterosexual, consensual fellatio among adults, the Court declined to follow suit with regard to Article 125(a), "*absent authority from the Supreme Court.*". *Id.* at 178 (emphasis added).

was unquestionably consensual conduct," the Court "[n]evertheless detect[ed] *no indication from the Supreme Court which permit[ed] [them] to override the intent of Congress. See Bowers v. Hardwick*, 478 U.S. 186 (1986-)." *Id.* (Emphasis added). Ironically, it is unlikely that the State of Florida, where the oral-genital act occurred, would have prosecuted appellant.[4]

In decisions which preceded *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Seventh Circuit Court of Appeals suggested and one United States District Court held that the Constitution prohibits states from criminalizing private, consensual acts of sodomy performed by married couples.[5] Additionally, in a post-*Eisenstadt* case, another United States District Court suggested in *dicta* that the Constitution bars states from restricting private acts of heterosexual fellatio performed by married or unmarried adults. *Lovisi v. Slayton*, 363 F. Supp. 620, 624-26 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied sub nom. Lovisi v. Zahrandick*, 429 U.S. 977 (1976).

As many courts have held, the criminalization of consensual, noncommercial, private, heterosexual oral sex does indeed violate the right to privacy when the pro-

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[4]*See Mohammed v. State*, 561 So.2d 383 (Fla. Dist. Ct. App. 1990) (no prior record points should have been scored against Florida defendant for Georgia conviction for sodomy where neither the Florida statute prohibiting unnatural and lascivious acts (which was not sufficiently precise to define as criminal conduct consensual oral sex or fellatio performed by a man and a woman in the privacy of their bedroom) nor any other Florida statute contained elements of analogous offense to Georgia statute).

[5]*Cotner v. Henry*, 394 F.2d 873, 875 (7th Cir.), *cert. denied* 393 U.S. 847 (1968); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex), *vacated on other grounds*, 401 U.S. 989 (1970).

scribed act occurs between adults involved in a long-standing romantic relationship and in the privacy of one of the actor's homes. On a broad scale, this right is consistent with this Court's recognition that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 467 U.S. 747 (1986).

On a narrower scale, the right claimed by Petitioner is fully consistent with the right to privacy recognized by this Court in, *inter alia*, *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 489 (1965); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Carey v. Population Services International*, 431 U.S. 678 (1977). While this Court has found that the due process clause of the Fourteenth Amendment did not confer a fundamental right on homosexuals to engage in consensual sodomy, it based its holding on the lack of a "connection between family, marriage, or procreation on the one hand and homosexual activity on the other . . . ." *Bowers*, 478 U.S. at 191. There is indeed a connection, however, between "family, marriage, or procreation" interests and heterosexual oral sex when the latter occurs in the context of a long-standing dating relationship. Society's constantly increasing (and now almost overwhelming) acceptance of oral-genital sex[6] demonstrates that such activity is viewed as a key element of the physical relationship between a heterosexual couple. "Only the most wilful blindness could obscure the fact that sexual intimacy is 'a sensi-

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[6] *See generally Mohammed v. State*, 561 So. 2d 384, 386 n.1 (Fla. Dist. Ct. App. 1990) (citing study showing that 85% of wives surveyed by women's magazine reported using fellatio often or occasionally).

tive, key relationship of human existence, central to family life, community welfare, and the development of personality.'" *Bowers*, 478 U.S. at 205 (Blackmun, Brennan, Marshall, Stevens, JJ., dissenting), *citing Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

The Maryland Court of Appeals concluded, "very strong arguments, based on Supreme Court decisions and language in Supreme Court opinions, can be made on both sides of the constitutional right to privacy issue presented here." *Schochet*, 580 A.2d at 181. These strong conflicting arguments, coupled with the complete split among the various state and federal jurisdictions, and the Court of Military Appeals' subtle request for guidance, demonstrate the need for the Court to resolve this constitutional question.

II. THE COURT OF MILITARY APPEALS IMPROPERLY INTERPRETED *BOWERS V. HARDWICK*, 478 U.S. 186 (1986), AS STANDING FOR THE PROPOSITION THAT PETITIONER'S CONDUCT MAY BE CONSTITUTIONALLY PROSCRIBED.

Although the Court of Military Appeals did not issue a written opinion in petitioner's case, that Court has concluded that *Bowers* precludes judicial scrutiny and invalidation of the proscription against sodomy under Article 125(a), UCMJ, as applied to private, heterosexual, non-commercial, consensual, adult oral sex. *See United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992), *cert. denied*, 113 S. Ct. 92 (1992). This is not the case. This Court explicitly noted that its opinion regarding homosexual

sodomy in *Bowers* expressed no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy. *Bowers*, 478 U.S. at 187 n.2. The issue before this Court in *Bowers* was Hardwick's suit challenging the statute as applied to homosexual sodomy, and thus "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ." *Id.* at 190.

The issue presented by the Petitioner's case with regard to Article 125 is, nevertheless, quite distinct from that addressed by the Court in *Bowers*, involving as it does heterosexual sodomy. The Court of Military Appeals' decision in *Fagg* merely expropriated the reasoning in *Bowers*, which declined to "extend a fundamental right [under the due process clauses of the fifth and fourteenth amendments] to homosexuals to engage in acts of consensual sodomy." *Bowers*, 478 U.S. at 191-92. The Court of Military Appeals' reliance on *Bowers* is therefore fundamentally flawed, as *Bowers* is inapposite and did not *sub silentio* dispose of petitioner's case as the Court of Military Appeals inferred in the *Fagg* decision.

CONCLUSION

Although a number of state and federal courts have examined the constitutionality of proscribing consensual, noncommercial, private, heterosexual, adult oral sex, no consensus has emerged from these decisions; rather, there has been an "approximately even division among appellate courts." *Schochet*, 580 A.2d at 183. This split among jurisdictions warrants the Court's resolution of this issue.

Further, review of this case is imperative to resolve the issue left unresolved in *Bowers*: the constitutionality of proscribing consensual, heterosexual oral sex. The Court of Military Appeals has apparently only upheld the constitutionality of Article 125, UCMJ, because "absent authority from the Supreme Court, we cannot declare that there is a right to privacy in the Constitution that invalidates an Act of Congress outlawing fellatio." *Henderson*, 34 M.J. at 178. Such heterosexual acts are deserving of constitutional privacy protection against government intrusion absent a compelling government interest, a protection which was stripped from military married and single couples by the Court of Military Appeals' decisions in *Henderson* and *Fagg*.

Respectfully submitted,

MARY THERESA HALL
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General's Corps
United States Navy
Counsel of Record

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0195/NA
CMR Dkt. No. 92-1162

UNITED STATES, APPELLEE

v.

VINCENT E. ANDREWS (152 56 5771), APPELLANT

On consideration of the granted issue (Daily Journal January 31, 1994) in light of *United States v. Mitchell*, 39 MJ 131 (CMA 1994), and *United States v. Lewis*, 39 MJ 280 (sep. op.) (CMA 1994), it is by the Court this 28th day of June, 1994

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the NAVY
Appellate Defense Counsel (WITTSTADT)
Appellate Government Counsel (LAMBERT)

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0195/NA
CMR Dkt. No. 92-1162

UNITED STATES, APPELLEE

v.

VINCENT E. ANDREWS (152 56 5771), APPELLANT

On consideration of appellant's petition for reconsideration of the order of the Court issued on January 31, 1994, it is, by the Court, this 4th day of March, 1994,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the NAVY
Appellate Defense Counsel (WITTSTADT)
Appellate Government Counsel (LAMBERT)

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 94-0195/NA
CMR Dkt. No. 92-1162

UNITED STATES, APPELLEE

v.

VINCENT E. ANDREWS (152 56 5771), APPELLANT

On consideration of appellant's petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review, it is by the Court this 31st day of January 1994,

ORDERED:

That said petition is hereby granted on Issue IV raised by appellate defense counsel.

No briefs will be filed under Rule 25.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the NAVY
Appellate Defense Counsel (WITTSTADT)
Appellate Government Counsel (LAMBERT)

APPENDIX D

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE

DAVID C. LARSON EDWIN W. WELCH
R. M. MOLLISON

UNITED STATES

V.

Vincent E. ANDREWS, 152-56-5771
Hospital Corpsman Third Class (E-4), U.S. Navy

NMCM 92 01162 Decided 16 August 1993

Sentence adjudged 18 March 1992. Military Judge: S.B. Gallagher. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Training Center, Orlando, FL 32813-5005.

CAPT DWIGHT H. SULLIVAN, USMC, Appellate Defense Counsel
Maj S.R. THOMAS, USMCR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

We have examined the record of trial, the assignments of error,[1] and the Government's reply thereto, and we

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[1] I. THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO PRESENT EVIDENCE IN SENTENCING WHICH INDICATED THAT APPELLANT HAD COMMITTED FORCIBLE SODOMY WHERE HE PLED GUILTY TO CONSENSUAL SODOMY AND WHERE THE PRETRIAL AGREEMENT PRECLUDED THE GOVERNMENT FROM GOING FORWARD ON THE GREATER OFFENSE.

II. THE CONVENING AUTHORITY ERRED BY ACTING ON THE CASE BEFORE RECEIVING HIS STAFF JUDGE ADVOCATE'S ADVICE CONCERNING THE DEFENSE COUNSEL'S ALLEGATION OF LEGAL ERROR.

III. A SERVICE MEMBER CANNOT BE CONVICTED UNDER ARTICLE 125 FOR ENGAGING IN PRIVATE NONCOMMERCIAL, CONSENSUAL HETEROSEXUAL FELLATIO. [CITATIONS OMITTED.]

IV. THE COURT-MARTIAL DID NOT HAVE JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE. [CITATIONS OMITTED.]

V. THIS COURT HAS NO JURISDICTION BECAUSE ITS JUDGES ARE NOT APPOINTED TO FIXED TERMS OF OFFICE. [CITATIONS OMITTED.]

VI. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. [CITATIONS OMITTED.]

VII. BECAUSE THIS COURT'S JUDGES WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE, THIS COURT HAS NO POWER TO REVIEW APPELLANT'S CASE. [CITATIONS OMITTED.]

have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

In determining that the first assignment of error lacks merit, we observe that the record clearly indicates that the trial judge thoroughly vetted the evidence concerning the sodomy, plus the applicable law. Thereafter, he assured the appellant, counsel, and this Court that he considered the evidence "solely as information describing the circumstances of the sodomy and describing the entire course of conduct and . . . the impact on the victim. . . ." Record at 129. *See* Record at 56, 57, 103-135; Rule for Courts-Martial 1001(b)(4); *United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993) and cases cited therein at 436-437.

The second assignment of error has merit. As the Government concedes, the staff judge advocate should have commented in his recommendation to the convening authority on the defense counsel's assertion of legal error relating to the admission of evidence of alleged forcible sodomy. However, as indicated above, we conclude that the defense counsel's assertion of legal error had no merit. Under the circumstances of this case, we are convinced that a properly prepared recommendation would have had no effect on the convening authority's exercise of his discretion. Thus, as suggested by Judge Cox in *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988), we affirmatively find that the error in the recommendation was harmless.

The remaining assignments of error also lack merit. *United States v. Henderson*, 34 M.J. 174 (C.M.A. 1992); *United States v. Fagg*, 34 M.J. 179 (C.M.A. 1992), *cert.*

denied, 113 S.Ct. 92 (1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, 61 U.S.L.W. 3787 (U.S. May 24, 1993) (No. 92-1482); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Accordingly, the findings of guilty and the sentence as approved on review below are affirmed.

No. 94-518

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1994

VINCENT E. ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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Colonel, U.S. Marine Corps

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QUESTION PRESENTED

Whether petitioner's conviction, on his guilty plea, of consensual sodomy, in violation of Article 125 of the Uniform Code of Military Justice, 10 U.S.C. 925, violated a constitutional right to privacy.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-518

VINCENT E. ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a) summarily affirming the decision of the Navy-Marine Corps Court of Military Review is unreported. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 4a-7a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 28, 1994. The petition for a writ of certiorari was filed on September 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993) and 10 U.S.C. 867a(a).

STATEMENT

After entering guilty pleas, petitioner, a member of the United States Navy, was convicted by a general court-martial, the military judge sitting alone, of nine offenses, including three offenses against Petty Officer Catherine Holt, his former girlfriend: consensual sodomy, assault and battery, and indecent acts, in violation of Articles 125, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925, 928, and 934.[1] Petitioner was sentenced to a bad-conduct discharge, confinement for 30 months, reduction to the lowest enlisted grade, and forfeiture of pay and allowances. The Navy-Marine Corps Court of Military Review affirmed. Pet. App. 4a-7a. The Court of Military Appeals granted discretionary review of one issue and affirmed the judgment of the Navy-Marine Corps Court of Military Review. *Id.* at 1a. The Court of Military Appeals denied petitioner's petition for reconsideration of its limited grant of discretionary review. *Id.* at 2a.

1. Petitioner was originally charged with violating UCMJ Article 125, 10 U.S.C. 925, by committing sodomy with Petty Officer Holt "by force and without [her] consent."[2] Pursuant to a pretrial agreement, however,

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[1] Petitioner also was convicted, on guilty pleas, on two specifications of willfully disobeying an order, in violation of UCMJ Article 91(3), 10 U.S.C. 891(3); violating a lawful general order by possessing a knife, brass knuckles, and ammunition, in violation of UCMJ Article 92(1), 10 U.S.C. 892(1); two specifications of assault and battery against two service members, in violation of UCMJ Article 128, 10 U.S.C. 928; and assaulting a service member, in violation of UCMJ Article 134, 10 U.S.C. 934.

[2] Article 125 of the UCMJ, 10 U.S.C. 925, provides:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same

petitioner agreed to plead guilty to consensual sodomy with Petty Officer Holt, in exchange for the prosecutor's agreement not to go forward with the charge of forcible sodomy. Appellate Exh. I (at 1). The pretrial agreement permitted the prosecution to present evidence of the aggravating circumstances of the sodomy offense at sentencing. R. 57.

During the plea colloquy between petitioner and the military judge regarding the sodomy charge, petitioner claimed that Petty Officer Holt had taken his penis into her mouth voluntarily. R. 37. During the sentencing portion of the court-martial, Petty Officer Holt testified for the prosecution as follows. R. 99. She and petitioner had been living together in a romantic relationship. R. 101. On December 15, 1991, she told petitioner that she wanted to end the relationship and live separately. R. 107-110. Petitioner became enraged and hit her several times with his fist; he also masturbated until he ejaculated on her. R. 111-116.[3]

Eventually, petitioner agreed to leave if Petty Officer Holt allowed him to take her dog with him "as an assurance that he could come back." R. 117. When Petty Officer Holt refused, petitioner said that he would leave only if she performed fellatio on him. She began crying and told him that she did not want to do that. She began to scream, but no one responded. She believed that petitioner "was either gonna hurt [her], [or] * * * hurt

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or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

[3] Those actions were the basis for the assault and battery charge and the indecent act charge against petitioner.

[her] animals." R. 120. She could not leave the apartment, because petitioner was blocking the door. Believing she had no other choice, she performed fellatio on petitioner. R. 120-121.[4]

2. The Navy-Marine Corps Court of Military Review affirmed petitioner's sodomy convictions and sentence. Pet. App. 4a-7a.

3. The Court of Military Appeals granted review of one issue raised by petitioner, not the issue presented here (Pet. App. 3a), and affirmed (*id.* at 1a).[5] The court denied petitioner's request for reconsideration of its order granting limited discretionary review. *Id.* at 2a.

ARGUMENT

Petitioner contends that his conviction of consensual sodomy violates his constitutional right to privacy. That contention does not warrant further review.[6]

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[4] The military judge considered Petty Officer Holt's testimony only in determining the circumstances of the consensual sodomy offense and its impact on Petty Officer Holt, and not as evidence of the greater offense of forcible sodomy. R. 129.

[5] The Court of Military Appeals granted review of what petitioner designated "Issue IV," in which he asserted: "The Court-Martial did not have jurisdiction because the military judge was not appointed to a fixed term of office." Pet. App. 5a n.1. The question petitioner presents in this Court was designated "Issue III" in the Court of Military Appeals. See *ibid.*

[6] We note that this Court may lack jurisdiction to review petitioner's contention on certiorari. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. V 1993), provides that the Court "may not review by a writ of certiorari under this section any action of the Court of Military Appeals in refusing to grant a petition for review." Here, the Court of Military Appeals in this case did not grant review of the question presented in the petition, although it did grant review of a different question. See Pet. App. 3a. In any event, even if the Court has jurisdiction to review the question presented here, the fact that the question was not addressed by the

1. Petitioner waived any right to challenge his conviction of consensual sodomy by unconditionally pleading guilty to that offense. A criminal defendant who pleads guilty on the advice of competent counsel "waives all challenges to the prosecution except those going to the court's jurisdiction." *United States* v. *Waters*, 23 F.3d 29, 36 (2d Cir.), cert. denied, 115 S. Ct. 185 (1994). That waiver extends to challenges based on the Constitution. See, *e.g.*, *ibid.* (Ex Post Facto Clause challenge); *United States* v. *Stewart*, 972 F.2d 216, 217 (8th Cir. 1992) (Fourth Amendment challenge to trial evidence seized in a search); see also *United States* v. *Broce*, 488 U.S. 563, 569-574 (1989) (collateral challenge based on Double Jeopardy Clause); *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973) (collateral challenge based on allegedly unconstitutional composition of grand jury). Petitioner does not contend that his trial lawyer provided constitutionally deficient representation; that his challenge is jurisdictional; or that in pleading guilty he reserved the right to seek appellate review of the issue presented here. See Rule of Courts-Martial 910(a)(2) (permitting conditional pleas of guilty); cf. Fed. R. Crim. P. 11(a)(2). Under those circumstances, petitioner relinquished any right to seek further review of his sodomy conviction.

2. Petitioner urges this Court to grant review to resolve the "split among the various state and federal jurisdictions" (Pet. 4) on the question whether, consistently with constitutional protections of privacy, a person can be criminally punished for engaging in "private, noncommercial, consensual, adult, heterosexual oral sex" (Pet. i). This Court should decline to do so.

Court of Military Appeals in the first instance weighs against review by this Court.

First, that question is not presented here. The conduct for which petitioner was convicted was not consensual; petitioner forced Petty Officer Holt to perform fellatio on him. See pp. 3-4, *supra*. Petitioner does not, and cannot, claim that such non-consensual conduct is protected by the Constitution.[7]

Second, even if this case involved consensual sodomy, it would not provide an appropriate vehicle for resolving the asserted split. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker* v. *Levy*, 417 U.S. 733, 758 (1974). A decision by this Court in this military case therefore would not necessarily resolve the asserted split among the civilian courts.

3. Finally, petitioner contends (Pet. 8-9) that the Court of Military Appeals has erred by relying on *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), to uphold convictions for consensual heterosexual sodomy in prior cases. This Court denied further review in one such case, *United States* v. *Fagg*, 34 M.J. 179 (C.M.A.), cert. denied, 113 S. Ct. 92 (1992), and there is no reason for a different course here. The Court of Military Appeals has correctly relied on *Bowers* v. *Hardwick* in prior cases to determine the proper framework for deciding whether members of the military have a fundamental consti-

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[7] Because petitioner bases his challenge on substantive due process, rather than the First Amendment, he cannot argue that, even though his own conduct is not constitutionally protected, the UCMJ's sodomy provision is unconstitutionally overbroad because it applies to consensual sodomy. See *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610-611 (1973); cf. *Parker* v. *Levy*, 417 U.S. 733, 758-761 (1974). At any rate, petitioner does not make an overbreadth argument.

tutional right to engage in consensual heterosexual sodomy. See *United States* v. *Henderson*, 34 M.J. 174, 177-178 (1992). The court's holding in *Henderson* that there is no such right, which rested on the court's determination that the particular activity at issue "has been openly and expressly prohibited in the armed forces of the United States since time immemorial," *id.* at 176, does not warrant further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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